88-675 (1)

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1988

SYNERGY GAS CORPORATION,

Petitioner,

v.

ROBERT SASSO, Individually and as President of LOCAL 282, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ELLIOT J. MANDEL
(Counsel of Record)

KAUFMAN, FRANK, NANESS,
SCHNEIDER & ROSENSWEIG, P.C.
425 Broad Hollow Road
Melville, New York 11747
(516) 756-9110

Question Presented

Can a labor arbitrator expand the authority granted to him beyond the expired collective bargaining agreement, the parties' stipulated submission, or the underlying arbitration award? To wit: can an arbitrator *sua sponte* award payment of attorneys' fees to an entity not placed in issue, or the payment of pension monies, dues and interest five years after the expiration of the collective bargaining agreement?

List of Parties

The parties to the proceedings below were Petitioner Synergy Gas Corporation and the following Respondents: Robert Sasso, individually and as President of Local 282, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

Rule 28.1 List

The parent company of Synergy Gas Corporation is Synergy Group Incorporated. Synergy Gas Corporation has no subsidiaries other than wholly owned subsidiaries. Synergy Group Incorporated has no subsidiaries other than wholly owned subsidiaries.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Petitioner, Synergy Gas Corporation ("Synergy"), respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit, entered in the within proceeding on July 26, 1988.

Opinions Below

The opinion of the Court of Appeals is reported at 853 F.2d 59 (1988). It is reprinted in the appendix hereto, (App. A, *infra*, 1a-16a).

The memorandum decision of the United States District Court for the Eastern District of New York (Weinstein, D.J.) denying Petitioner's stay of arbitration and confirming the award of Arbitrator Jesse Simons has not been reported. It is reprinted in the Appendix hereto, (App. B, *infra*, 17a-18a).

Jurisdiction

Invoking federal jurisdiction under 28 U.S.C. Section 1441(c) and 29 U.S.C. Section 185(a), on August 5, 1987, the Respondents removed from Supreme Court of the State of New York, County of Nassau, to United States District Court, Eastern District of New York, Petitioner's Order to Show Cause and Petition to Vacate Arbitration Award, and Stay of Arbitration. On December 18, 1987, Respondents moved for summary judgment, and on January 11, 1988, Petitioner cross-moved for summary judgment. On January 25, 1988, the District Court granted Respondents' motion for summary judgment, and confirmed the Arbitrator's award in its entirety. On February 4, 1988, the District Court issued an Order to that effect. (App.. B, *infra*. 17a-18a).

On July 26, 1988, the Second Circuit entered a judgment and opinion affirming the order of the District Court. (App. A, *infra*, 1a-16a).

The jurisdiction of this Court to review the judgment of the Second Circuit is invoked under 28 U.S.C. Section 1254(1).

Statutes Involved

The statutes involved herein are Section 301(a) of the Labor Management Relations Act of 1947, 29 U.S.C. Section 185(a), as it provides to federal courts the basis of jurisdiction in labor-management contract disputes and Section 10(d) of the Federal Arbitration Act, 9 U.S.C. Section 10(d), as it sets forth standards for review of an Arbitrator's Award.

Section 301(a) of the LMRA provides:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Section 10(d) of the Arbitration Act reads:

> In either of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—
>
> (d) Where the arbitrators exceed their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

Statement of the Case

This case presents the important and unresolved issue of an arbitrator's authority to fashion a remedy in the case before him, and whether limitations are to be applied based upon the submission, the applicable collective bargaining agreement, and an underlying arbitration award.

The issue arises in the context of a tension between *United Steelworkers of America* v. *Enterprise Wheel and Car Corp.*, 363 U.S. 593 (1960) and one of its progeny, *United Paperworkers International Union, AFL-CIO,* v. *Misco, Inc.*, —— U.S. ——, 56 U.S.L.W. 4011 (1987).

Whereas *Enterprise Wheel* teaches us that the arbitrator's award must not go beyond the submission, and must draw its essence from the collective bargaining agreement before the award can be enforced, *Enterprise Wheel* also notes that an arbitrator is to bring his informed judgment to bear in order to reach a fair resolution of the problem, including the formulation of the remedy. *Misco* notes that where it is contemplated that the arbitrator will determine the remedy, courts have no authority to disagree with his honest judgment in that respect.

This case squarely presents the question of whether an arbitrator may fashion additional remedies beyond those granted to him in the collective bargaining agreement, the arbitral submission, and a prior arbitrator's award five years after the expiration of the underlying agreement.

This is an important question of law which no other Circuit has addressed, and which urgently requires an answer by this Court.

Facts and Prior Proceedings

Petitioner is a New York Corporation engaged in the sale and distribution of propane gas and related products, with its principal office and place of business at 175 Price Parkway, Farmingdale, New York. Petitioner has facilities located in Long Island and Brooklyn.

James Brown, a cylinder truck driver employed by Petitioner, was discharged on October 24, 1980. Arbitration proceedings were brought by Respondents. Arbitrator James A. Cashen found that Synergy failed to show just cause for the discharge. Arbitrator Cashen's award was limited and directed Synergy to reinstate Brown and provide him with a "lump sum back pay award" (App. A, *infra*, 3a).

Petitioner commenced the initial proceeding in this matter on October 27, 1981, by petitioning the Supreme Court of the State of New York to vacate the Cashen award on the grounds that he engaged in misconduct in procuring the award. The State Supreme Court confirmed the award, but the Appellate Division, Second Department reversed and remanded and ordered a hearing on the merits. The State Supreme Court thereafter confirmed the award, which was later affirmed by the Appellate Division.

A second arbitration hearing was held before Arbitrator Jesse Simons to determine the following issue, as stated in the stipulated submission:

> What relief, if any, is James Brown entitled to pursuant to the Arbitration award of James Cashen dated October 5, 1981? (App. C, *infra*, 20a).

Both the Cashen award and the stipulated submission expressly limited remedial relief to James Brown only. Simons did not adhere to the express limitations on his authority in that he awarded attorneys' fees and other monies to Respondent.

On July 30, 1987, Petitioner moved in the Supreme Court of the State of New York, County of Nassau to vacate Arbitrator Simons' award and to stay any further arbitrations on the grounds that *inter alia*, his award was in excess of his authority and irrational. On August 5, 1987, Local 282 petitioned the United States District Court, Eastern District of New York for removal. On August 20, 1987, Petitioner sought to remand the action in the Eastern District to state court, pursuant to 28 U.S.C. Section 1447(c). On September 11, 1987, the District Court denied Petitioner's motion.

On December 18, 1987, Respondents moved in the District Court for summary judgment. Petitioner filed a cross-motion for summary judgment on January 11, 1988. On January 25, 1988, the District Court granted Respondents' motion for summary judgment and confirmed Arbitrator Simons' award in its entirety, and remanded to the arbitrator the determination of the amount of attorneys' fees and union dues. The District Court issued its Order on February 4, 1988. (App. B, *infra*, 17a-18a).

Petitioner appealed to the United States Court of Appeals for the Second Circuit. On July 26, 1988, the Court of Appeals affirmed the order of the District Court. (App. A, *infra*, 1a-16a).

REASONS FOR GRANTING THE WRIT

POINT I

This Court should decide what limits are to be applied to the remedial authority of arbitrators.

The Second Circuit, while recognizing that the standards for review of an arbitration award are severely limited, failed to apply the proper standard to determine whether the arbitrator acted within his authority to award monies beyond back pay. As the Second Circuit correctly noted, *Enterprise Wheel* is in congruence with the authority of Section 10(d) of the Federal Arbitration Act, 9 U.S.C. Section 10(d) (1982), which provides that an arbitration award must be vacated "[w]here the arbitrators exceeded their powers, or so imperfectly executed them that a mutual final and definite award upon the subject matter was not made."

The Second Circuit's flawed analysis properly began with the initial award by Arbitrator James Cashen. Cashen heard and determined the initial issue of whether or not Brown had been discharged for cause. In his award, Cashen found that Brown's discharge was not proper, and specifically stated:

> The Employer is directed to reinstate grievant retroactive to the date of discharge and is directed to provide grievant with a lump sum back pay award equal to the difference between what the grievant would have received in full employment with Glover[1] during

1. Glover Bottled Gas Corporation is a predecessor of Synergy Gas Corporation.

the period in question minus any amounts actually earned from other employment or received as unemployment insurance during the period (App. A, *infra*, 3a).

Thus, with this as background, a second arbitration before Arbitrator Simons was commenced. This arbitration drew its authority from the Cashen award as explicitly stated above, and implicitly from the expired collective bargaining agreement (App. D, *infra*, 21a-22a), and the stipulated submission.

The expired collective bargaining agreement's clause entitled "Strikes, Lockouts, Arbitration and Grievances" (App. D, *infra*, 21a-22a) does not provide for payment of attorneys' fees, dues, and pension and welfare payments or interest thereon. Indeed, the Section involved specifically provides that the sole remedy for a wrongfully discharged employee shall be reinstatement with full back pay for all time lost (App. D, *infra*, 22a).

Nor is there authority in the Simon arbitration proceeding itself for the proposition that the parties agreed to expand the power of the arbitrator beyond that of the Cashen award or the collective bargaining agreement. As Simons noted in the opening paragraph of his award, the stipulated submission was "What relief, if any, is James Brown entitled to pursuant to the Arbitration Award of James Cashen, dated October 5, 1981?" (App. C, *infra*, 20a). Moreover, the colloquy of the parties when framing the issue did not contemplate an expansion of Arbitrator Simons' power beyond that in the collective bargaining agreement or in the Cashen Award (App. E, *infra*, 23a-32a).

While the Second Circuit correctly noted that judicial intervention is generally disfavored under this Court's holding in *United Steelworkers of America* v. *American Manufacturing Co.*, 363 U.S. 564 (1960), and cases under Section 10 of the Federal Arbitration Act, 9 U.S.C. Section 10(d), the Circuit Court failed to recognize that Simons' powers were limited by the collective bargaining agreement, the submitted stipulation and the prior Cashen award. The Second Circuit correctly cited *Misco* for the proposition that when an arbitrator determines remedies for contract violations, courts have no authority to disagree with the arbitrator's honest judgment in that respect (App. A, *infra*, 12a). What the Circuit disregarded was the fact that the authority of Arbitrator Simons was much more circumscribed than the traditional authority of arbitrators as contemplated in *Misco*. Here, the Circuit Court ignored (1) the specific remedy as directed by Arbitrator Cashen, (2) the clear language of the contract providing for a specific remedy for discharged employees and (3) the submission of the parties when the Circuit enforced Simons' award of attorneys' fees, dues, pension contributions and interest to the Respondents, and employee Brown.

As noted in the seminal work *How Arbitration Works*, Elkouri and Elkouri, BNA Books, 4th Edition (1985) p. 688, the traditional remedies which arbitrators grant for an improper discharge are reinstatement with or without back pay, or some combination thereof. What the Circuit Court enforced here was an arbitrator's award giving extraordinary remedies from a limited submission, a limited collective bargaining agreement and a limited prior award.

POINT II

The Circuit's decision ignores this Court's expressions on arbitrators' authority.

The Supreme Court, on several occasions, has enunciated the proper standard of review to be applied to arbitrator's awards. In the almost thirty years since this Court issued the famous trilogy of cases, *United Steelworkers of America* v. *American Manufacturing Co.*, 363 U.S. 564 (1960); *United Steelworkers of America* v. *Warrior and Gulf Navigation Co.*, 363 U.S. 574 (1960) and *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960), this Court has adhered to a policy that an arbitrator's remedy must draw its essence from the collective bargaining agreement. As this Court observed in *United Paperworkers International Union, AFL-CIO* v. *Misco, Inc.*, —— U.S. ——, 56 U.S.L.W. 4011, 4014 (1987):

> The arbitrator may not ignore the plain language of the contract; but the parties having authorized the arbitrator to give meaning to the language of the agreement, a court should not reject an award on the ground that the arbitrator misread the contract. *Enterprise Wheel, supra,* at 599. So, too, where it is contemplated that the arbitrator will determine remedies for contract violations that he finds, courts have no authority to disagree with his honest judgment in that respect . . . . [T]he arbitrator's award settling a dispute with respect to the interpretation or application of a labor agreement must draw its essence from the contract and cannot simply reflect the arbitrator's own notions of industrial justice. . . . But as long as the arbitrator is even arguably construing or applying the

> contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision. Of course, decisions procured by the parties through fraud or through the arbitrator's dishonesty need not be enforced. But there is nothing of that sort involved in this case.

Indeed, the Court has never directly passed upon an issue similar to that presented here. While the *Misco* decision is insightful to this Court's thinking, *Misco* is a different case than that at the bar. Both cases are founded on the fundamental question of whether the arbitrator's award "draws its essence from the collective bargaining agreement." Thereafter, the cases are different: in *Misco*, there were no limitations in the collective bargaining agreement or otherwise on the arbitrator's authority; in the instant case, there are numerous limitations on the arbitrator's authority and otherwise. In *Misco*, the parties stipulated that the issue before the arbitrator was whether there was just cause to discharge Cooper because of alleged drug possession, and "if not, what, if any, should be the remedy." In *Misco*, the Court felt duty bound to affirm the arbitrator's finding of no just cause, and the arbitrator's order of reinstatement, back pay and full seniority to Cooper. Said the Court, "The parties did not bargain for the facts to be found by a court, but by an arbitrator chosen by them who had more opportunity to observe Cooper and to be familiar with the plant and its problems." The Court did note that the parties to the applicable collective bargaining agreement in *Misco* could have, but chose not to set procedural rules such as specific remedies for the arbitrator to follow.

In the instant case, Petitioner and Respondents agreed in the collective bargaining agreement to the remedy in the case of a wrongfully discharged employee: back pay and reinstatement to the employee (App. D, *infra*, 22a). While the Second Circuit refers to the above—cited portions of *Misco*, it treats the important issue of the submission to the arbitrator in short shrift. Said the Circuit: "In light of these principles, we dismiss Synergy's contentions based on the purported scope of the Cashen award" (App. A, *infra*, 12a). The Circuit failed to fulfill its obligation under *Misco* to examine the collective bargaining agreement, and the stipulated issue of the parties before affirming the arbitration award.

Other Circuits have examined arbitrator's awards in similar circumstances, and refused to enforce them. In *Courier-Citizen Company* v. *Boston Electrotypers Union No. 11*, 702 F.2d 273, 281 (1st Cir. 1983) the Employer moved to vacate an arbitration award favorable to the union, and the union counterclaimed for enforcement. On appeal, the First Circuit found that the arbitrator exceeded his authority by awarding money to a Mr. Sparks who was adversely affected by the initial layoff. The Circuit noted that the submission before the arbitrator was: "Did the Company violate the contract by placing Richard Grant in the laborer's job . . . If so, what shall be the remedy?" The First Circuit refused to allow back pay to Sparks because it was outside of the scope of the submission to the arbitrator. The Court noted that the arbitrator "lacks authority to decide questions the parties have not agreed to submit to him." 702 F. 2d at 281. Further, the First Circuit noted that while the award to Sparks was a traditional back pay remedy, it could not be enforced because

> [I]t cannot be said that the parties normally suppose that an arbitrator will fashion a remedy similar to the Sparks award involving a third person whose job was never initially placed in issue at all. Rather the parties typically assume that the arbitrator will limit his award of damages to the employees directly harmed by the employer's breach of the submitted provision of the collective bargaining agreement. *Id.* at 282

Here too, the arbitrator lacked authority to decide questions and provide remedies the parties did not agree to submit to him by prior award, the collective bargaining agreement or the stipulated submission.

The First Circuit's above holding is consistent with its position in *Local Union No. 251, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America* v. *Narragansett Improvement Co.*, 503 F.2d 309 (1st Cir. 1974), where the Circuit pointed out that "[j]udicial intrusion is restricted to extraordinary situations indicating abuse of arbitral power or exercise of power beyond the jurisdiction of the arbitrator." Accord, *Raytheon Co.* v. *Computer Distributors, Inc.*, 632 F. Supp. 553, 556-557 (D. Mass. 1986).[2]

In *Piggly Wiggly Operator's Warehouse, Inc.* v. *Piggly Wiggly Operators' Warehouse Independent Truck Driver Union, Local No. 1*, 611 F.2d 580 (5th Cir. 1980), the Employer moved to vacate an arbitration award. The District Court granted the motion to vacate the award, then reversed itself and confirmed the award. The Circuit Court, in determining what the issue was before the arbitrator, dis-

2. See also, *Floors, Inc.* v. *B.G. Danis of New England, Inc.*, 380 Mass. 91, 401 N.E. 2d 839 (1980) (Supreme Judicial Court of Massachusetts refused to award attorneys' fees in a commercial arbitration as it was not before the arbitrator).

cussed the difference between arbitrating with and without a submission. The Court noted that when the parties enter into a submission agreement, this latter "contract" is the substitute for legal disputes over the issue before the arbitrator; it joins the issues between the parties and empowers the arbitrator to decide them. *Id.* at 584. In contrast, the Circuit noted that when the parties do not agree on a submission they then must ask the arbitrator to decide the written grievance as it has been posed in the grievance steps prior to arbitration. *Id.* The Court noted that it is then up to the arbitrator to decide the issue, and the written grievance and the contract define the limits of the arbitrator's authority.[3]

Moreover, the Second Circuit ignored its own teachings when it confirmed the Simons' award. In *Ottley* v. *Schwartzberg*, 819 F.2d 373 (2d Cir. 1987), the Circuit relied upon the following quotation for the proposition that an arbitrator does not have authority to review compliance with his own award:

> "[T]he scope of authority of arbitrators generally depends on the intention of the parties to an arbitration and is determined by the agreement or submission. Such an agreement or submission serves not only to define, but to circumscribe the authority of arbitrators." 6 C.J.S. *Arbitration* Section 69 at 280-81 (1975).

However, in the case at bar, the Second Circuit only quoted the first of the two sentences it relied upon in *Ottley* (App. A, *infra*, 10a). As can be seen, the second sentence is clearly a limitation upon the first, and clearly

3. See also, *Luggage & Novelty Workers Local 66* v. *Neevel Luggage Mfg. Co., Inc.*, 325 F.2d 992 (8th Cir. 1964) (affirming a District Court's denial of an enforcement of an award because the arbitrator granted relief beyond the submission).

serves to express the proper limitation upon an arbitrator's authority when the parties stipulate the submission to him. Just as the arbitrator in *Ottley* had no authority to police his first award, it is clear that Simons did not have power to go beyond the Cashen award, the collective bargaining agreement's express limitation as to remedy, and the parties' submission in the instant case.

Moreover, the arbitrator and the Second Circuit clearly missed the importance of the limitation of the collective bargaining agreement as set forth in Section 12(e) (App. D, *infra*, 21a-22a). That clause allowed the Union to strike if there was no Employer compliance within 15 days with the arbitration award. Section 12(e) did not allow the arbitrator to award attorneys' fees upon non-compliance under any stretch of the imagination. Rather, the Circuit Court cited *Misco* for the proposition that when it is contemplated that arbitrators will determine a remedy, courts have no authority to intrude (App. A, *infra*, 12a). How a clause that permits a strike over non-compliance with arbitration awards can be transmogrified into the basis for awarding attorneys' fees is incomprehensible. Such an award does not draw its essence from the collective bargaining agreement, and must be refused enforcement. See *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960).[4]

4. Moreover, Respondent's allegation that Petitioner violated Section 12(e), made five years after any alleged violation occurred, was untimely. The collective bargaining agreement does not enumerate an express time limitation in which to grieve an alleged violation, in which case a reasonable time limit is applied. An allegation made five years after the alleged violation occurred is totally unreasonable. Moreover, a violation of the collective bargaining agreement was *not* urged by Respondent at the arbitration, nor would one be arbitrable. See, *Nolde Bros.* v. *Bakery Workers Local 358*, 430 U.S. 243 (1977); *Indiana and Michigan Electric Company*, 284 N.L.R.B. No. 7 (1987).

The more considered approach to awarding attorneys' fees in arbitrations is that set forth in *Sammi Line Co., Ltd.* v. *Altamar Navegacion S.A.*, 605 F. Supp. 72, at 73-74 (S.D.N.Y. 1985), a case dealing with commercial arbitration. Judge Sand wrote:

> Since the traditional American rule is that attorneys' fees are generally not awarded, and the arbitrators may decide only issues submitted for Arbitration, the burden is on Respondent to demonstrate that an award of attorneys' fees was included within the scope of the arbitrable issue.[2]

2. It may well be that the shipping industry as a whole or particular parties may prefer that attorneys' fees be awarded consistent with the concept of making the prevailing party whole. All that is required to accomplish this result is, of course, a single additional sentence in the standard form, or in a rider to make clear this intention.

As that Court noted, in the circumstances without the clear agreement of the parties, the arbitrator had no authority to award attorneys' fees.

So too here, without clear agreement of the parties, there can be said to be no agreement to include attorneys' fees and other monetary items in the matter before the arbitrator. Moreover, the limitation of the collective bargaining agreement, the prior award, the submission, as well as labor arbitration practice, militates against awarding of attorneys' fees and other monies.

POINT III

The Circuit Court's affirmation of attorneys' fees is contrary to public policy.

This Court has never set standards as to the awarding of attorneys' fees in arbitration cases. No Circuit has passed upon the issue except for the Circuit herein. Under the prevailing American rule, in a federal action, attorneys' fees cannot be recovered in the absence of statutory authority for the award. *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240, 247 (1975). Moreover, it is clear that Section 301 of the Labor Management Relations Act, 29 U.S.C. Section 185, does not provide for attorneys' fees in actions to enforce and confirm an arbitrator's award. See, *Bell Production Engineers Association* v. *Bell Helicopter Textron*, 688 F.2d 997, 999 (5th Cir. 1982); *International Chemical Workers Union, AFL-CIO, Local No. 227* v. *BASF Wyandotte Corporation*, 774 F.2d 43 (2d Cir. 1985); *Children's Hospital* v. *Buffalo and Western New York Hospital & Nursing Home Council*, 582 F. Supp. 1147, 1154 (W.D.N.Y. 1984).

Congress has recognized that the traditional "American rule" is applied in arbitration cases. In passing the Civil Service Reform Act of 1978, 5 U.S.C. Section 7101 *et seq.* Congress was well aware of the teachings of *Alyeska Pipeline Service Company*, 421 U.S. 240 (1975), and the tradition of not awarding attorneys' fees in arbitartion proceedings. Thus, Congress took it upon itself to amend the Back Pay Act of 1966 (5 U.S.C. Section 5596(b)) to provide for the payment of reasonable attorneys' fees in arbitration cases in the federal sector. See, *In Re Department of the Treas-*

ury, United States Custom Service. 79 Lab. Arb. (BNA) 284 (1982), for a full discussion of this exception to the American rule in arbitrations.

The imposition of attorneys' fees in such a mundane case poses enormous questions for the future of arbitration. As this Court noted in *W.R. Grace & Co.* v. *Local 759, International Union of the United Rubber, Cork, Linoleum And Plastic Workers of America*, 461 U.S. 757 (1983), if arbitrators are to be bound by public policy, it must be well defined, dominant and "made by reference to the laws and legal precedents and not from general considerations of supposed public interests." See *Muschany* v. *United States*, 324 U.S. 49, 66 (1945). For an arbitrator to feel that he is bound by public policy to award attorneys' fees, when clearly public policy and authority is to the contrary, is an abuse of the arbitrator's power.

Moreover, the implications of an award of attorneys' fees, if such were legitimately before the arbitrator, are enormous. As noted in *How Arbitration Works, supra*, p. 407, attorneys' fees are rarely awarded. For an arbitartor to take such upon himself, in the name of compensatory damages, is an extraordinary departure from the traditional American rule in labor arbitrations, and contrary to New York law as set forth in *Garrity* v. *Lyle Stuart, Inc.*, 40 N.Y.2d 354 (1976).[5]

The Second Circuit herein noted that attorneys' fees are not routinely awarded in labor arbitrations. (App. A,

5. Accord, *Grossman* v. *Laurence Handprints—N.J. Inc.*, 90 A.D.2d 95, 455 N.Y.S.2d 852 (2d Dept. 1982); *Geneseo Police Benevolent Association, Council 82* v. *Village of Geneseo*, 91 A.D.2d 858, 458 N.Y.S.2d 384 (4th Dept. 1982); *aff'd* 59 N.Y.2d 726, 463 N.Y.S.2d 440 (1983).

infra, 13a). However, the Second Circuit pins its affirmance of attorneys' fees upon the slender reed of two district court cases: *Fortex Manufacturing Co.* v. *Local 1065, Amalgamated Clothing Workers of America*, 99 L.R.R.M. (BNA) 2303, 2304-05 (M.D. Ala. 1978) and *Litton Unit Handling Systems* v. *Shopmen's Local Union No. 522*, 90 L.R.R.M.(BNA) 3176, 3177 (S.D. Ohio 1975). Both those cases are clearly distinguishable from the facts herein.

In *Fortex*, the District Court upheld an arbitrator's award of attorneys' fees because the parties stipulated that the arbitrator was to base his decision upon federal law as if the action were brought in federal district court.

Since the Company voluntarily withdrew its Section 301 suit from district court and agreed to submit the dispute over damages inflicted by the union during a strike to arbitration, and because the arbitrator did not stray from the scope of the submission (e.g., arbitrator's powers would equal court's powers), the court deferred to the arbitrator's grant of legal fees based upon his conclusion that the union failed to undertake every reasonable means to end the strike. 99 L.R.R.M. at 2305. This consent to vastly expand the arbitrator's powers was dispositive and is absent from the instant action.

The reasoning of *Fortex* is inapplicable to the Simons award. In the Simons award, the remedy he was to calculate was clear: the lump sum award due Brown under the Cashen award, the submission and the collective bargaining agreement. No reference was made to equitable powers of district courts to award attorneys' fees. Rather, *Fortex* is clearly in favor of the Petitioner's position that arbitrators cannot award attorneys' fees.

In *Litton Unit Handling Systems* v. *Shopmen's Local Union No. 522*, 90 L.R.R.M. 3176, 3177 (S.D. Ohio 1975), the court upheld the arbitrator's award of counsel fees to the employer caused by the unsuccessful union's unjustified delay and obstinacy in proceeding through arbitration. The court concluded that such an award drew its essence from the agreement because it agreed with the arbitrator's supplemental decision which concluded that the grievance arbitration procedure was totally frustrated and essentially abandoned by the union's deliberate dilatory tactics aimed at avoiding the speedy and efficient dispute resolution procedure provided for in the contract. Here, Petitioner's initial motion to vacate the 1981 Cashen award resulted in a hearing in State Supreme Court as to the merits of its contention of misconduct by Arbitrator Cashen, and a stay of proceedings until 1986. No bad faith could or should be drawn where here a Court gave pause, and credence to the position of the Petitioner. There is a vast difference between "bad faith" and legitimate but rejected positions, and for an arbitrator to take the position as did Mr. Simons that a position intially sustained but ultimately rejected by the Appellate Division becomes tantamount to bad faith is absurd.

The Second Cirucit relied upon the granting of attorneys' fees in certain "labor cases" to support the proposition that attorneys' fees should be confirmed in this arbitration. *None* of the cases cited by the Circuit were labor arbitration matters. The Circuit Court relied upon *Tiidee Products, Inc.*, 194 N.L.R.B. 1234, 1235 (1972) *modified and enforced*, 502 F.2d 349 (D.C. Cir.), *cert. denied*, 417 U.S. 921 (1974) to support the proposition that attorneys' fees can be awarded in the instant case. Fees were awarded in

that case by the NLRB because of the "patently frivolous objection to the election and subsequent refusal to bargain."[6] The unusual fee award occurred in the context of an extended organizational drive that required the union to effectively have to reorganize the bargaining unit before effective bargaining could begin as a result of the Employer's dilatory tactics. Further, the Second Circuit's reliance upon *Bill Johnson's Restaurants, Inc.* v. *N.L.R.B.*, 461 U.S. 731, 747 (1983) and *Baptist Memorial Hospital*, 229 N.L.R.B. 45, 46 (1977) for the proposition that attorneys fees can be awarded in labor cases is disingenuous. Both those cases compensated employees under the provisions of the traditional "make-whole" remedies of the NLRA, as set forth pursuant to 29 U.S.C. Section 160(c). See also, *N.L.R.B.* v. *Joseph T. Strong d/b/a Strong Roofing and Insulating Co.*, 393 U.S. 359 (1969). Thus, none of the three cases relied upon by the Second Circuit for the proposition of awarding attorneys' fees in labor cases are applicable herein because each was a unique circumstance not involving an arbitration award.

The Second Circuit's wrongly placed emphasis upon the holding in *Kamakazi Music Corp.* v. *Robbins Music Corp.*, 684 F.2d 228, 231 & n. 6 (2d Cir. 1982) is an example of its attempt to reach a result. That case was brought pursuant to the Copyright Act, 17 U.S.C. Section 505, which expressly authorizes payment of attorneys' fees. In contrast, neither the Federal Arbitration Act nor Section 7513 of the New York Civil Practice Law and Rules (McKinney 1980) applicable herein provide for the payment of attorneys' fees in arbitration cases.

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6. 194 N.L.R.B. at 1236.

Since 1959, labor arbitration has become increasingly important in assuring stable labor-management relations in the United States. The Second Circuit's opinion charts new territory that requires the scrutiny of this Court before it becomes generally accepted law, because of possible deleterious consequences upon the labor arbitration process that flow from the impact of the Second Circuit's opinion.

Conclusion

For the foregoing reasons, Petitioner respectfully submits that the writ should be granted.

Respectfully submitted,

ELLIOT J. MANDEL

KAUFMAN, FRANK, NANESS,
SCHNEIDER & ROSENSWEIG, P.C.
425 Broad Hollow Road
Melville, New York 11747
(516) 756-9110

APPENDICES

APPENDIX A

Opinion of the United States Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1130—August Term, 1987

(Argued May 16, 1988 Decided July 26, 1988)

Docket No. 88-7153

SYNERGY GAS CO.,

Plaintiff-Appellant,

—v.—

ROBERT SASSO, Individually and as President of Local 282, BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA,

Defendant-Appellee.

Before:

MESKILL and WINTER, *Circuit Judges*, and MCCURN, *District Judge*.*

Appeal from an order of the United States District Court for the Eastern District of New York, Weinstein, *J.*,

* Honorable Neal P. McCurn, United States District Judge for the Northern District of New York, sitting by designation.

confirming an arbitration decision awarding, *inter alia*, a discharged employee back pay and the employee's union reasonable attorney's fees.

After concluding that we have jurisdiction to decide this appeal despite the fact that the amounts of attorney's fees and union dues payable have not yet been determined, we reject the argument that the petition for removal to federal court was not timely. As to the merits of the appeal, we affirm the district court's order confirming the arbitration award.

PETER A. SCHNEIDER, Melville, New York (Kaufman, Frank, Naness, Schneider & Rosensweig, Melville, New York, of counsel), *for Plaintiff-Appellant*.

FRANKLIN K. MOSS, New York City (Friedman, Levy-Warren & Moss, New York City, of counsel), *for Defendant-Appellee*.

MESKILL, *Circuit Judge*:

Plaintiff-appellant Synergy Gas Co. ("Synergy" or "the employer") appeals from an order of the United States District Court for the Eastern District of New York, Weinstein, *J.*, that, *inter alia*, confirmed an arbitration decision awarding a discharged employee back pay and the employee's union reasonable attorney's fees and remanded the action to the arbitrator to determine the amount of attorney's fees and union dues payable. On appeal, Synergy argues that the district court erred in

denying its motion to remand the action to state court and in confirming the arbitrator's award of attorney's fees and back pay because the arbitrator exceeded his authority in making such an award.

We conclude that the district court's order was final and appealable and that the petition for removal was timely. We affirm the district court's judgment.

BACKGROUND

This action has a rather long and complicated history and only the pertinent highlights will be summarized here. James Brown, who was represented by Local 282, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America ("Local 282" or "the union"), was discharged by Glover Bottled Gas Corp. (Glover), Synergy's predecessor, in October 1980. The collective bargaining agreement (the agreement) entered into by Glover and the union contained a broad arbitration clause, which provided for arbitration of "[a]ll disputes between the parties to this Agreement." J. App. at 14. Accordingly, the discharge was submitted to arbitration. On October 5, 1981, Arbitrator James Cashen issued an award, stating:

> The Employer is directed to reinstate grievant retroactive to the date of discharge and is directed to provide grievant with a lump sum back pay award equal to the difference between what grievant would have received in full employment with Glover during the period in question minus any amounts actually earned from other employment or received as unemployment insurance during the period.

See id. at 27.

Although section 12(e) of the agreement required that the parties comply with the terms of any arbitration decision within fifteen days, the employer did not reinstate Brown or provide him with any back pay. Rather, the employer brought an action in New York State Supreme Court, Suffolk County, seeking to vacate the arbitration award because of alleged misconduct by Cashen. The state court action was unsuccessful and the award was confirmed. The confirmation was affirmed by the Appellate Division. *Glover Bottled Gas Corp.* v. *Local 282, IBT*, 119 A.D.2d 727, 501 N.Y.S.2d 394 (2d Dep't 1986).

The employer still refused to reinstate Brown or to pay him any back pay, however, allegedly because of subsequent events, including the decline of Brown's health. Local 282 then filed a new grievance seeking a determination of "[h]ow much money and what other relief are James Brown and Local 282 and [its] affiliated funds entitled to receive pursuant to the arbitration award of James Cashen dated October 5, 1981." *See* J. App. at 31.

The new action was assigned to Arbitrator Jesse Simons. On June 15, 1987, after four days of hearings, Arbitrator Simons issued an opinion and award directing Synergy to pay Brown back pay in the amount of $57,285 plus accrued interest, minus the amount of union dues that would have been deducted from Brown's wages, with the amount of said dues to be paid to Local 282. The award also directed Synergy to make certain contributions to the Local 282 Pension Trust Fund and to pay to Local 282 "a sum equal to the reasonable attorneys' fees incurred as a result of litigating the Employer's refusal to comply with Arbitrator Cashen's Award of October 5, 1981 in violation of Section 12(e) of the [agreement.]" *Id.* at 428. Arbitrator Simons explicitly retained jurisdiction to determine

the amount of union dues and attorney's fees, and indicated that hearings to set these amounts would be scheduled as promptly as possible.

On June 23, 1987, the attorney for Local 282 wrote to the employer's attorney, requesting payment of $513 in union dues and $50,000 in attorney's fees pursuant to the Simons award. The employer did not agree to pay these amounts, and the union then contacted Arbitrator Simons and requested that he determine the amount of attorney's fees and union dues to be paid.

Synergy subsequently initiated a lawsuit in New York State Supreme Court, Nassau County, seeking to vacate the Simons award and to stay further arbitration proceedings. A stay of arbitration was granted on July 30, 1987. Local 282 then removed the action to federal court, and Synergy filed a motion to remand the proceeding to state court, arguing that the petition for removal was untimely because the Nassau County proceeding was a continuation of the prior Suffolk County action. In an oral decision on September 11, 1987, Judge Weinstein denied this motion, holding that the two state court actions were independent proceedings. *See* J. App. at 526.

Subsequently, both parties moved for summary judgment. By an oral opinion on January 25, 1988 followed by an order dated February 4, 1988, the district court confirmed the Simons award and remanded the issues concerning union dues and attorney's fees to the arbitrator, retaining jurisdiction with respect to the subject matter of the remand.

Synergy then brought this appeal, arguing that the district court should have granted its motion to remand the action to state court and that the court erred in confirming Arbitrator Simons' award.

DISCUSSION

I. *Jurisdiction*

Under 28 U.S.C. § 1291 (1982), courts of appeals "have jurisdiction of appeals from all final decisions of the district courts of the United States." Both parties contend that the district court's order is final, and thus appealable. Nevertheless, we must make our own determination concerning whether we have jurisdiction to decide this appeal. *See Liberty Mutual Insurance Co.* v. *Wetzel*, 424 U.S. 737, 740 (1976).

Although the district court did confirm Arbitrator Simons' decision to award attorney's fees and union dues, the amounts of these fees and dues have not yet been set. Thus there is a question whether the district court's order confirming the Simons award is a final decision within the meaning of section 1291. In resolving this issue, the Supreme Court's very recent decision in *Budinich* v. *Becton Dickinson and Co.*, 56 U.S.L.W. 4453 (U.S. May 23, 1988), provides guidance. In that case, the Court considered the question of whether a decision on the merits is a final decision within the meaning of section 1291 when the availability or amount of attorney's fees had not yet been determined. The Court concluded that in order to preserve "operational consistency and predictability in the overall application of § 1291," it was required to adopt "a uniform rule that an unresolved issue of attorney's fees for the litigation in question does not prevent judgment on the merits from being final." *Id.* at 4454. In light of this rule, we assume that the fact that the amount of attorney's fees has not yet been set does not deprive us of jurisdiction to decide this appeal. As to the question of union dues, we agree with the parties' submission that computation of this amount is simply a "ministerial task;" that is, determina-

tion of the dues will be mechanical and uncontroversial. *See Parks* v. *Pavkovic*, 753 F.2d 1397, 1401-02 (7th Cir.), *cert. denied*, 473 U.S. 906 (1985). Consequently, we conclude that the court's order confirming the arbitration award is final and appealable.

II. *Remand to the State Court*

We must address one additional preliminary issue before we can reach the merits of Synergy's appeal. Synergy contends that the district court erred in denying its motion to remand this action to the New York State Supreme Court, Nassau County, because Synergy's petition for removal to federal court was untimely under 28 U.S.C. § 1446(b) (1982). Section 1446(b) provides that a petition for removal is to be filed within "thirty days after the receipt by the defendant . . . of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based." Synergy posits that although Local 282 removed the 1987 action in the New York Supreme Court, Nassau County, to federal court promptly upon receipt of the petition to vacate the Simons award, the 1981 action in Suffolk County to vacate the Cashen award and the 1987 action to vacate the Simons award are the same proceeding. Synergy adds that the union's failure to remove the Suffolk County action in 1981 constitutes a waiver of its right to remove the Nassau County action in 1987.

In making this argument, Synergy relies on *Marchant* v. *Mead-Morrison Mfg. Co.*, 29 F.2d 40 (2d Cir. 1928), *cert. denied*, 278 U.S. 655 (1929). In *Marchant*, we held that for removal purposes, an application for appointment of an arbitrator under an arbitration clause in a contract and a subsequent application for an order confirming the award were not separate proceedings; rather, "[i]t was all one

arbitration proceeding . . . ." *Id.* at 43. We thus concluded that since the proceeding for the appointment of an arbitrator took place in state court, the district court should have remanded the action seeking to confirm the arbitration award to state court. *Id.*

Synergy here argues that because the Simons award concerned the implementation of the Cashen award, the 1987 Nassau County petition to vacate the Simons award was "part and parcel" of the 1981 Suffolk County action. Synergy thus submits that *Marchant* is controlling and the petition for removal was untimely. We disagree. The 1981 Suffolk County action was based on alleged misconduct on the part of Arbitrator Cashen. In contrast, the 1987 Nassau County action included allegations by Synergy that because of circumstances subsequent to the Cashen award, it had no obligation to reinstate him. For example, Synergy argued before Arbitrator Simons that the termination of the collective bargaining agreement ended its back pay obligations, and that Brown's job had been eliminated, and so Synergy did not have any obligation to rehire Brown. These issues were not addressed by Arbitrator Cashen nor were they considered in the 1981 Suffolk County proceedings. We therefore hold that the 1981 action and the 1987 action should be considered to be separate proceedings for removal purposes.

This conclusion that they are distinct proceedings is bolstered by our decision in *International Chemical Workers Union, Local No. 227* v. *BASF Wyandotte Corp.*, 774 F.2d 43 (2d Cir. 1985). In that case, we held that the elimination of a discharged employee's position in a new collective bargaining agreement raised a "new and separate issue" that was not considered by an arbitrator who had ordered reinstatement and back pay, and thus the case

should go to fresh arbitration. *Id.* at 46. *See also Ottley* v. *Schwartzberg*, 819 F.2d 373, 376 (2d Cir. 1987) (holding that district court erred in remanding compliance issues to the original arbitrator).

Moreover, we note that if *Marchant* were held to be controlling in cases like this one, unions and employees in the future would be compelled to remove all routine state court proceedings in order to preserve the right to remove any remotely related action that may subsequently arise. Especially in the context of arbitrable labor disputes, where judicial intervention by federal courts is disfavored, *see generally United Steelworkers of America* v. *American Manufacturing Co.*, 363 U.S. 564 (1960), such a result is undesirable. We thus hold that the petition for removal of the 1987 action was timely because this action is separate and distinct from the prior Suffolk County proceedings.

III. *Confirmation of the Simons Award*

Synergy argues that the district court erred in confirming the award because Arbitrator Simons exceeded his authority in awarding attorney's fees, union dues and other payments to parties other than Brown, and that the award of back pay was "totally irrational." We first note that our "function in confirming or vacating an arbitration award is severely limited. If it were otherwise, the ostensible purpose for resort to arbitration, i.e., avoidance of litigation, would be frustrated." *Amicizia Societa Navegazione* v. *Chilean Nitrate and Iodine Sales Corp.*, 274 F.2d 805, 808 (2d Cir.), *cert. denied*, 363 U.S. 843 (1960). The only statutory grounds for vacating an arbitration award are enumerated in section 10 of the Federal Arbitration Act, 9 U.S.C. § 10 (1982). Subsection (d) of section 10, which is the only subsection that is possibly relevant here, provides that an arbitration award can be

vacated "[w]here the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter was not made." We have consistently accorded the narrowest reading to this subsection, especially when it "has been invoked in the context of arbitrators' alleged failure to correctly decide a question which all concede to have been properly submitted in the first instance." *In re Andros Compania Maritima, S.A.*, 579 F.2d 691, 703 (2d Cir. 1978) (footnote omitted). *See also United States Steel and Carnegie Pension Fund* v. *Dickinson*, 753 F.2d 250, 252-53 (2d Cir. 1985).

In this case, in making its argument that Arbitrator Simons exceeded his authority in making awards of payments other than back pay, Synergy relies on the stipulated submission to the arbitrator of the question of "[w]hat relief, if any, is James Brown entitled to pursuant to the Arbitration Award of James Cashen dated October 5, 1981?" Synergy contends that in light of this stipulation, the arbitrator only had authority to provide a back pay remedy to Brown, and that he had no authority to award anything to any party other than Brown.

It is true that the " 'scope of authority of arbitrators generally depends on the intention of the parties to an arbitration, and is determined by the agreement or submission.' " *Ottley*, 819 F.2d at 376 (quoting 6 C.J.S. *Arbitration* § 69, at 280-81 (1975)). Nonetheless, we conclude that Arbitrator Simons had authority to award payments other than back pay. He expressly noted that it was his understanding that under the stipulated submission, he would adjudicate all of the union's claims for relief, especially considering the July 12, 1985 demand for arbitration that sought a determination of "[h]ow much money and what

other relief are James Brown and Local 282 and affiliated funds entitled to receive pursuant to the arbitration award of James Cashen dated October 5, 1981?" *See* J. App. at 362 n.*. During the hearings, when the parties were discussing the scope of the submission, Arbitrator Simons noted that the submission was agreed upon

> with the clarification, which is now on the record perhaps three times, that I have made, namely, that you are free to advance all these other claims, and I will adjudicate them, and he is free to advance arguments where you are not entitled to pension contributions, or payment of legal fees, or [payment of] medical fees, et cetera, et cetera?

J. App. at 200. In addition, the parties apparently acquiesced to the arbitrator's interpretation of the stipulated submission.

> [Local 282's Counsel]: Based upon clarification and the understanding that you interpret this language to include—if it's justified—relief that might be actually paid to some other entity, I have no problem with that.
>
> THE ARBITRATOR: So when I said up for grabs, I mean up for grabs.
>
> [Synergy's Counsel]: Yes.
>
> THE ARBITRATOR: All right.
>
> [Synergy's Counsel]: Insert the words "If any," and—

Id. at 201. Considering the long standing rule that any doubt concerning the scope of the submission agreement is to be resolved in favor of coverage, *see Federal Commerce & Navigation Co.* v. *Kanematsu-Gosho, Ltd.*, 457 F.2d

387, 390 (2d Cir. 1972), we conclude that Arbitrator Simons had the authority under the stipulated submission to decide whether to award payments other than back pay, such as pension fund contributions, union dues and attorney's fees. Consequently, Synergy's argument that the arbitrator exceeded his authority in making such awards in light of the stipulated submission is devoid of merit.

Synergy also claims that because the Cashen award referred to a "lump sum back pay award," payments other than back pay could not be awarded. As Arbitrator Simons repeatedly explained, however, he understood back pay to include all those payments that were required to make Brown whole. In addition, he believed that in light of the requirement of section 12(e) of the agreement that a party comply with an award within fifteen days, he was to hold the employer liable for damages that were caused by its failure to comply. As the Supreme Court explained in *United Paperworkers International Union, AFL-CIO* v. *Misco, Inc.*, 56 U.S.L.W. 4011, 4014 (U.S. Dec. 1, 1987), when it is contemplated that the arbitrator will determine remedies for contract violations, courts have no authority to disagree with the arbitrator's honest judgment in that respect. In addition, although an arbitrator's award settling a dispute should draw its essence from the contract, "as long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision." *Id.* In light of these principles, we dismiss Synergy's contentions based on the purported scope of the Cashen award.

Synergy also raises additional arguments that relate only to the alleged impropriety of the awarding of the attor-

ney's fees. Arbitrator Simons explained that he decided to award attorney's fees for two separate reasons: (1) because the employer violated the collective bargaining agreement twice—once by discharging Brown without just cause, and again by not complying with the mandate of the Cashen award that it reinstate Brown and give him back pay; and (2) because the employer had acted in bad faith within the meaning of *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240 (1975), by, *inter alia*, deliberately choosing to violate its contractual obligations, and by bringing "a wholly spurious and unmeritorious claim of arbitral misconduct," J. App. at 424.

We first note that although attorney's fees are not routinely awarded in labor disputes, it has been held that they may be awarded in certain circumstances. For example, attorney's fees have been authorized in labor disputes where the employer's defenses are frivolous, in order to discourage "brazen" refusals to bargain. *See, e.g., Tiidee Products, Inc.*, 194 N.L.R.B. 1234, 1235 (1972), *modified and enforced*, 502 F.2d 349 (D.C. Cir.), *cert. denied*, 417 U.S. 921 (1974). Moreover, it has been held that a court can properly make an award of attorney's fees when a party has unjustifiably refused to abide by an arbitrator's award. *See Courier-Citizen Co.* v. *Boston Electrotypers Union No. 11*, 702 F.2d 273, 282 (1st Cir. 1983); *International Association of Machinists & Aerospace Workers* v. *Texas Steel Co.*, 639 F.2d 279, 284 (5th Cir. 1981); *Chauffeurs, Teamsters and Helpers, Local Union No. 765* v. *Stroehmann Brothers Co.*, 625 F.2d 1092, 1094 (3d Cir. 1980); *International Union of District 50* v. *Bowman Transportation, Inc.*, 421 F.2d 934, 935 (5th Cir. 1970). *See also Bill Johnson's Restaurants, Inc.* v. *NLRB*, 461 U.S. 731, 747 (1983) (noting that the NLRB has the authority to order an employer to reimburse employees,

against whom the employer had wrongfully brought suit, for attorney's fees and expenses); *Baptist Memorial Hospital*, 229 N.L.R.B. 45, 46 (1977) (awarding an employee attorney's fees that were incurred directly as a result of employer's unlawful policies and conduct in order to make employee whole).

Arbitrators have also occasionally awarded attorney's fees. For example, in *Fortex Manufacturing Co.* v. *Local 1065, Amalgamated Clothing Workers of America*, 99 L.R.R.M. (BNA) 2303, 2304-05 (M.D. Ala. 1978), the court enforced an arbitrator's decision to award attorney's fees. The arbitrator's decision had been based both on his finding that the defendant had acted in bad faith and on his belief that the fees should be considered to be damages because they were incurred by the plaintiff as a direct result of the defendant's unlawful actions. In addition, in *Litton Unit Handling Systems* v. *Shopmen's Local Union No. 522*, 90 L.R.R.M. (BNA) 3176, 3177 (S.D. Ohio 1975), the court concluded that an arbitrator had not exceeded his authority in awarding attorney's fees in order to compensate a party "for losses occasioned by obvious attempts to frustrate access to the contractually created arbitration forum."

In the instant case, in addition to the arguments based on the stipulated submission and the purported scope of the Cashen award, which we have previously dismissed, Synergy contends that the awarding of the attorney's fees is prohibited under New York C.P.L.R. § 7513 (McKinney 1980). Section 7513 provides that "[u]nless otherwise provided in the agreement to arbitrate, the arbitrators' expenses and fees, together with other expenses, not including attorney's fees, incurred in the conduct of the arbitration, shall be paid as provided in the award." As we

concluded in *Kamakazi Music Corp.* v. *Robbins Music Corp.*, 684 F.2d 228, 231 & n.6 (2d Cir. 1982), however, section 7513 "does not bar the award of attorney's fees; it merely does not grant authority to do so." Accordingly, Synergy's argument concerning section 7513 can be quickly dismissed.

Synergy also claims that the award of attorney's fees was punitive in nature, and that under *Garrity* v. *Lyle Stuart, Inc.*, 40 N.Y.2d 354, 356, 386 N.Y.S.2d 831, 832, 353 N.E.2d 793 (1976), an arbitrator is not authorized to award punitive damages as a matter of public policy under New York law. We are not convinced, however, that the award was punitive. Arbitrator Simons emphasized that in awarding the fees, he was attempting to make the union whole for the costs that it had expended on behalf of Brown. *See* J. App. at 421-23. Although Arbitrator Simons did also find that Synergy had acted in bad faith, this finding does not mandate the conclusion that the award was punitive. Rather, the award can be considered compensatory because if Synergy had not acted in bad faith, then Brown would have been reinstated more than six years ago and the attorney's fees would not have been incurred. As we recognized in *In re South East Atlantic Shipping Ltd.*, 356 F.2d 189 (2d Cir. 1966), even if an arbitrator expresses moral outrage at a party's behavior and considers questions of business morality in deciding upon the proper remedy, the award, even if it is very liberal, does not necessarily constitute the imposition of "unlawful" punitive damages. *Id.* at 192. *See also General Drivers and Helpers Union, Local No. 554* v. *Young and Hay Transportation Co.*, 522 F.2d 562, 568 (8th Cir. 1975) (concluding that a court's award of attorney's fees in a labor dispute is an appropriate item of damages and is compensatory, rather than punitive); Note, *Punitive Dam-*

ages in Arbitration: The Search for a Workable Rule, 63 Cornell L. Rev. 272, 307 (1978) (recommending that arbitration awards that compensate parties for the costs of litigation be considered compensatory, rather than punitive).

Synergy also disputes certain factual findings of the arbitrator, such as the finding of bad faith. We dismiss these claims, however; "[b]ecause the parties have contracted to have disputes settled by an arbitrator chosen by them rather than by a judge, it is the arbitrator's view of the facts and of the meaning of the contract that they have agreed to accept." *Misco*, 56 U.S.L.W. at 4014. As to Synergy's various arguments about why the award is irrational, we conclude that these contentions are also without merit because Arbitrator Simons certainly provided more than a "barely colorable justification" for his holdings, *see Pinkerton's NY Racing Security Service, Inc.* v. *Local 32E Service Employees International Union*, 805 F.2d 470, 473 (2d Cir. 1986), in his well reasoned sixty-eight page opinion.

CONCLUSION

For the foregoing reasons, we affirm.

APPENDIX B

Opinion of the United States District Court, Eastern District of New York, Weinstein, Ch. J.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

Index No. CV-87-2718

(Weinstein, Ch. J.)

In the Matter of the Petition to Vacate Arbitration Award and Stay Arbitration Demanded of

SYNERGY GAS CORPORATION,

Petitioner,

against

ROBERT SASSO, Individually and as President, LOCAL 282, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Respondent.

ORDER

This matter having come before the Court on cross motions for summary judgment, and the parties having appeared for oral argument before the Honorable Jack Weinstein on January 25, 1988, and the Court having rendered its oral decision on that date, it is hereby Ordered and Adjudged (1) that the application of Synergy Gas Corporation to stay arbitration is denied; (2) the Arbitration Award of Jesse Simons dated June 15, 1987 is hereby

confirmed in its entirety; (3) the stay of arbitration in case No. 14548/87, Supreme Court, Nassau County, granted July 30, 1987, is hereby vacated; and (4) the determination of the amount of attorneys' fees and Union dues payable pursuant to Sections III-A and III-B of the Simons Award is remanded to the Arbitrator for further proceedings. The Court retains jurisdiction over any further proceedings with respect to the subject matter of the remand.

Close the Case, subject to a motion to reopen.

Dated: Brooklyn, New York
February 4, 1988

JACK B. WEINSTEIN

U.S.D.J.

APPENDIX C

Excerpts from Opinion and Award of Arbitrator Simons

AMERICAN ARBITRATION ASSOCIATION, ADMINISTRATOR

In the Matter of the Arbitration

BETWEEN

LOCAL 282, INTERNATIONAL BROTHERHOOD OF TEAMSTERS

and

GLOVER BOTTLED GAS CORP./SYNERGY GAS CORP.
(AAA Case No. 1330-1154-85)

OPINION AND AWARD

Pursuant to the rules of the American Arbitration Association, the undersigned was designated by the American Arbitration Association ("AAA"), in a letter dated May 28, 1986 as Arbitrator to hear and render a final and binding Award concerning a dispute between the above-captioned Parties regarding the grievance of James Brown.

The Parties stipulated that the Arbitrator was to adjudicate the following:

"What relief, if any, is James Brown entitled to pursuant to the Arbitration Award of James Cashen dated October 5, 1981?" (Tr. 172)*

On written notice to both Parties, hearings occurred on June 24, July 15, October 15, and November 26, 1986 in the New York City offices of the AAA, and both Parties were present and represented by counsel; the Employer by Peter A. Schneider, Esq. and Lewis Goldberg, Esq., and the Union by Franklin Moss, Esq. and Sophis Davis, Esq., and both were afforded full opportunity to examine and cross-examine witnesses, to introduce evidence and to present argument.

A transcript** was prepared and copy of same supplied the

* * *

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* In its Demand For Arbitration dated July 12, 1985, Local 282 states as the issue to be arbitrated the following: "How much money and what other relief are James Brown and Local 282 and affiliated funds entitled to receive pursuant to the arbitration award of James Cashen dated October 5, 1981?" This Demand was filed pursuant to Union Exhibit 2, the Collective Bargaining Agreement between the above Parties effective August 1, 1979 to July 31, 1982, extended by the Parties to January 31, 1983, which, in Article 12, contains a provision for arbitration of unresolved disputes by an arbitrator chosen from the panel of the AAA.

In the course of colloquy, Tr. 158-172, the Arbitrator achieved agreement between the Parties on the above-stipulated submission while simultaneously, and repeatedly, stating that he would adjudicate all of the Union's claims under it, especially in light of the above July 12, 1985 Demand For Arbitration.

** All references herein to the transcript will be designated Tr.

APPENDIX D

Collective Bargaining Agreement Section 12

SECTION 12: STRIKES, LOCKOUTS, ARBITRATION AND GRIEVANCES

(a) There shall be no strikes or lockouts during the terms of this Agreement.

(b) No employee shall be disciplined or discharged without just cause.

(c) All disputes between the parties to this Agreement which relate to the interpretation or application of this Agreement shall, if not resolved amicably at conference between the parties, be referred to arbitration.

(d) The arbitrator shall be selected jointly by the parties from a panel of arbitrators provided by the American Arbitration Association. All expenses of arbitration shall be shared equally by the parties and under its rules.

(e) There shall be compliance by the parties with an arbitration award issued pursuant hereto within fifteen (15) days after its issuance.

* * *

Notwithstanding subdivision (a) of this Section 15, [sic] the UNION may engage in a work stoppage against the EMPLOYER upon the latter's failure to comply with an arbitration award within the time specified above unless an order staying the effectiveness of the award has been entered by the Court of competent jurisdiction. Nothing contained herein shall constitute a limitation upon the rights of this EMPLOYER or the UNION to seek judicial

review of an arbitration award under applicable provisions of law.

(f) In the case of an arbitration based on the discharge of an employee, the discharged employee may attend the arbitration hearings, and, in the event that the arbitrator finds that the discharge was not justified, the employee shall be reinstated, with full back pay for all time lost.

* * *

APPENDIX E

Excerpts from Transcript of Proceedings, before Arbitrator pages 158-172

* * *

our open items, the matter of the issue. Shall we start with that? If you will look at the transcript of the first day of hearing you will see that we are virtually at agreement on the matter of joint framing of the issue to be adjudicated by me .

Mr. Schneider: Mr. Arbitrator, the award arbitrator of Arbitrator Cashen, which leads us to these proceedings, says at page ten of his decision, "Specifically what the employer is directed to do."

And it states: "To reinstate the Grievant and to provide Grievant with a lump sum back payment award, equal to the difference between what Grievant would have received in full employment with Glover during the period in question, minus any amounts actually earned from other employment or received as unemployment insurance."

I think that is Union Exhibit 1. I believe that the proper issue should track the direction of Arbitrator Cashen, without mention of any foundations or benefits.

The Arbitrator: Let us not beat around the bush. The key phrase, as far as the Union is concerned, as far as I understand it in the areas we are talking about, is the phrase, "Reinstating Grievant," that phrase, if we are going to have to argue about it. I would love to here (sic) argument. As I understand it means to reinstate the grievant to employee status.

Whatever rights he gets as a result thereafter, active reinstatement directed by Mr. Cashen is the basic grounds,

as I understand the position of the Union, for their contention, with respect to various other matters, and they will argue on that.

But we have two pieces here in the award. We have the—according to the grievant—of reinstatement to employee status and a retroactive payment. Now, so as I see it, there are two clear and distinct types of relief. The employer never accorded to the—as I understand—accorded either of these things to the grievant.

They neither accorded him employee status and whatever rights accrue to him in consequence of, nor, did they give him a lump sum back pay monies equal to the difference between what he would have received, minus any amounts from any other employment or unemployment insurance during the period of time from his discharge to the date of the award.

So you have two separate and discreet types of relief. Relief to be given to him under any award that I issue, that flow to him in consequence of Mr. Cashen's directing that he be reinstated to employee status, on the one hand, and the specific and narrow issue of the retroactive matter, from the period from the time of his discharge, to October 5, 1981, the date of Mr. Cashen's award.

Does that help clarify the situation?

Mr. Schneider: No. I don't agree.

The Arbitrator: All right. Will you give me argument on the subject?

Mr. Schneider: I do not agree at all. I think there was a directive as to what the grievant on reinstatement would be entitled to. The grievant is no longer capable of reinstatement. And what it was that Arbitrator Cashen directed be done is all that remains. And what he has directed is not nearly as expansive as you would so describe.

Mr. Moss: I think it's clear he directed back pay until the time of his award, and then he directed reinstatement. And we are asking for damages, both, for the back pay from the time of the award, and we are also seeking damages because of the failure to comply with reinstatement.

The Arbitrator: And any rights he may have in consequence of his reinstatement to employee status.

Mr. Schneider: I understand what the argument is. I don't agree to it, and I don't think that a plain reading of what Arbitrator Cashen said. It has been painted as if there was no merit to these proceedings. But the appellate division thought enough of it to direct it back to the Supreme Court.

Mr. Moss: Because of allegations that proved to be false after a hearing.

Mr. Schneider: The fact is, that the employer had good reason to pursue the matter, that the court did so, and now when finally the court has made its determination and the grievant is not able to be reinstated, we are here and we are still talking about what, in our opinion, the lump sum back pay to which he may be entitled to is, and nothing more.

The Arbitrator: Counselor, let us back up here and look in the opinion here. It is abundantly clear--and I don't know how many arbitrations awards you have read, or how experienced you are in the field of labor relations—it's perfectly clear from the opinion that the relief accorded to the grievant consisted of two pieces, like any arbitration award involving a discharge found to be without just cause.

Number one, reinstatement to employee status. And there are no ifs, ands, of buts about it. There cannot be any

other construction of it. There can't be; as well as money, if putting him back to work with full back pay. That is what he's doing. Here I will read it to you, if you will wait a moment.

Mr. Moss: The fact is, if he had been reinstated in compliance with the award, the Union would have received Union dues. The Union pension would have received contribution, and the Union would not have had to pay his legal fees because the company would have. "Employer to comply with the award."

The Arbitrator: Here, page 9, referring to the company, the Arbitrator says—

Mr. Schneider: What paragraph?

The Arbitrator: Page 5, second paragraph. Excuse me. Page 5, line four:

"having failed in its burden of proof"—referring to the company—"the arbitrator is constrained, despite the prior and acceptable performance of grievants to direct grievants' reinstatement to employment."

Now there can't be anything clearer than that. I used the phrase reinstatement to employee status. That's what it means, reinstatement to employee status. So once he is reinstated, as he should have been pursuant to the award of Arbitrator Cashen, effective to the award October 4, 1980, (sic) to the time of actual reinstatement, minus whatever monies. He is directing both, both monies and reemployment or return to—Iwill use the exact words.

"Directing grievants, a reinstatement to employment." And to make it perfectly clear, here he adds the word "And", "And to order back pay." There is no question about it. And whatever rights he has in consequence of Mr. Cashen, he has got.

Now that there is legitimate argument about it. I want to have it. I want to consider it, and I want to weigh it, because I don't know. I don't have an opinion on the matter. But there is no question but that the Arbitrators' award called for reinstatement to employee status.

Mr. Schneider: I don't disagree with the statement.

The Arbitrator: Therefore, he is entitled to whatever rights as an employee he would have had, had he not been discharged. And any framing of the issue that doesn't deal with that would not only do him an injustice, but would be improper on my part, as an arbitrator, in dealing with the matters referred to me by the demand for arbitration and all of the matters related in the court action.

Mr. Schneider: Mr. Arbitrator.

The Arbitrator: Yes, sir.

Mr. Schneider: Neither you, myself, or Mr. Moss were involved, I believe, back in the trying of this matter. I assume counsel was able and urged all sorts of positions to the Arbitrator as to what realm he should direct. All I have is what the direction of this arbitrator was. I see no direction as to anything, for instance—and I am using as, for instance—that dues should be paid. As a for instance, an arbitrator may artfully draft or re-artfully draft—

The Arbitrator: Let me stop you. I want to hear this argument after we establish one thing. On this we are going to be clear. How are we going to do it in the terms of the framing of issue? I don't know why. One thing is absolutely clear, but there is no question that that award confers on this grievant two things, retroactive from the date of the award back to the date of the discharge, plus, reinstatement to employment.

Once he is reinstated to employment, once this award is given full force and effect, certain rights are accrued to

him, the consequence of the collective bargaining agreement and whatever other claims that he may have as an employee against this employer, as maybe advanced by the Union. You have ever (sic) right to argue against them, be they either statutory or contractual. But there is no question, no question. Absolutely can't be any question. That's what I want to stay with.

Mr. Moss: Let me suggest—

The Arbitrator: Is that clear?

Mr. Schneider: I hear what you're saying. But it cannot bring me to the point where I will stipulate, I believe, to an issue, definition, that's broader than was framed by Mr. Cashen.

The Arbitrator: All right.

Mr. Schneider: I guess maybe what you would make of it at that point, maybe that's what we are talking about. Maybe it's really an argument in the sense as to your rights.

The Arbitrator: The arbitrator does have "A right," statutory right—not even a right. Arbitrators have very frequently framed an issue when the parties have failed, sometimes with the permission of the parties, statements without permission of the parties. It is better, especially in a tangled case like this, where I'm sure both parties are involved in a good faith effort, or I hope they are, to see that the matter, being adjudicated here is adjudicated fully, fairly, and completely. And he gets whatever he is entitled to get. Nothing more. Either under statute or under the collective agreement.

What my rights are to constitute is another tangled issue, and I hope we don't have to get into it. But you probably know something about Arbitrator's roles and external roles bearing on employees' rights under that law.

Be that as it may, I think what we should do is frame these issues in terms of the two categories of relief directed by Mr. Cashen, which the Union is seeking, heretofore, conferred on this grievant.

What they are, what they will ultimately come to be, in terms of money or anything else, et cetera, that's a different issue that you can argue. But that there are two categories is perfectly clear. And I will be perfectly willing to frame it, while you guys talk about something else, such as subpoenas. It will just take me five minutes and I think I can do it. But to express myself on what I think would be proper framing of the issue, and I would make reference to Cashen, you have to. This flows from Cashen.

Mr. Schneider: That is what I recall from our discussion when we first—

The Arbitrator: It is in the transcript.

Mr. Schneider: I am not referring directly. Besides the situation I found myself in, was that we were at the point where the issue was, almost, what relief, if any, was Mr. Brown entitled to pursuant to this award.

The Arbitrator: That is right.

Mr. Schneider: But we then got into further discussion, such as what relief—for lack of a better word—others than Mr. Brown might be entitled to. And at that point I think our discussions ceased.

The Arbitrator: We were deadlocked.

Mr. Schneider: If it goes back to the very basic notion of what relief, if any, is Mr. Brown entitled to pursuant to the award of Arbitrator Cashen, dated October 5, 1981, now I can say for certain, I don't have a problem with that. But I have a problem if it goes beyond that.

The Arbitrator: I don't wat (sic) you to go away with any mistaken impression. I have made it aboundantly (sic)

clear on the record, I believe he is entitled to two forms of a relief. And if we agree—I say, if we agree on the framing of the issue it's perfectly clear in my mind that there would be two categories.

Now how to fill the category in as to retroactive payment, that is a snap. Any arbitrator can do that. But as to the other one, you will have ample opportunity to set forth what you think on any of the claims that the Union may advance under the second category, either as to pension contributions, as to payments of dues, as to reimbursement of the Union for legal fees, et cetera, et cetera. They will make their argument, you will make your argument, and I will decide them—

Mr. Schneider: The question still remains—

The Arbitrator: —one right after the other.

Mr. Schneider: What is the issue?

The Arbitrator: I am telling you right now, if you leave the issue as what relief is James Brown entitled to pursuant to the arbitration award of James Cashen dated October 5, 1981, or what relief, if any, if you like, then everything is up for grabs. And I will decide everything, as each claim advanced by the Union will receive consideration by me, will be argued by the Union, will be argued by you. And I will decide whether or not that relief goes to him under the language that I cited before. Namely, the reinstatement reinstatement (sic) to employment language. And I don't want you to be under any misgivings.

Mr. Schneider: I am not under any misgivings. I don't know if it is being suggested I should have a more precise one.

The Arbitrator: No, nothing is being suggested. I just want you to know my thinking in the matter.

Counselor, can you agree to a a (sic) stipulated issue to be arbitrated, which would consider the very simple language, what relief is James Brown entitled to pursuant to Arbitrator Cashen's award of October 5, 1981 with the clarification, which is now on the record perhaps three times, that I have made, namely, that you are free to advance all these other claims, and I will adjudicate them, and he is free to advance arguments where you are not entitled to pension contributions, or payment of legal fees, or of payment medical fees, et cetera, et cetera?

I am saying all the claims you would advance under the heading of his rights as a reinstated employee pursuant to Cashen, I will entertain them. I will consider them, and I will decide them, and I will direct a payment with respect to that, if your argument is sustained. If it is not, there will be no direction of payment.

Mr. Moss: Based upon clarification and the understanding that you interpret this language to include—if it's justified—relief that might be actually paid to some other entity, I have no problem with that.

The Arbitrator: So when I said up for grabs, I mean up for grabs.

Mr. Schneider: Yes.

The Arbitrator: All right.

Mr. Schneider: Insert the words "If any," and—

The Arbitrator: So let us then rewrite what now appears as 6, and agree to it on the record.

Mr. Schneider: Which we have been on?

The Arbitrator: Yes.

The Arbitrator: The parties are agreed, and have so stated, that the following issue is the issue to be arbitrated by me: "What relief, if any, is James Brown entitled to

pursuant to the arbitration award of James Cashen, dated October 5, 1981."

It is perfectly clear, based on the entire transcript of the all inclusiveness of this, that it goes to two general issues, namely, whatever rights he would have had as an employee returned to employee status pursuant to the award of Mr. Cashen and the retroactive element. And I will hear argument from both parties on any and all aspects of this matter. And I will decide each claim, either up or down. And then I will direct, or make full payment, as is justified and warranted, under the circumstances, from the facts and the arguments presented. All right? Are you happy?

The Arbitrator: Off the record.

(Discussion held off the record.)

The Arbitrator: Back on the record.

Cancellation of fees. What is the problem?

Mr. Schneider: As counsel for the employer, a bill was sent to me which divided the fees equally. And the employer—

The Arbitrator: What were you billed

* * *

Supreme Court, U.S.
FILED
NOV 23 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-675

IN THE

Supreme Court of the United States

October Term, 1988

SYNERGY GAS CORPORATION,

Petitioner,

v.

ROBERT SASSO, Individually and as President of LOCAL 282, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

EUGENE S. FRIEDMAN
(Counsel of Record)
FRIEDMAN LEVY-WARREN & MOSS
1500 Broadway
New York, New York 10036
(212) 354-4500

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1988

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Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Respondent, Robert Sasso, President of Local 282, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (hereinafter, "Local 282" or "the Union"), respectfully prays that this Court deny the Petition of Synergy Gas Corporation ("Synergy" or "the Employer") for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this matter on July 26, 1988.

Statement of the Case

The Petition for a Writ of Certiorari herein represents the latest step in an eight year effort by the Employer to thwart

a remedy for violations of the 1979-1982 collective bargaining agreement between the parties ("the Agreement").[1]

In October 1980, the Employer discharged James Brown, a driver represented by Local 282. The Union sought arbitration on Mr. Brown's behalf, and on October 4, 1981, Arbitrator James Cashen issued an Award directing the Employer to reinstate Brown retroactive to the date of discharge and to pay him full backpay. Joint Appendix before the United States Court of Appeals for the Second Circuit ("JA") 18-27.

Under Section 12(e) of the Agreement, a party is required to comply with an arbitration award within fifteen days after its issuance. Appendix to the Petition for the Writ of Certiorari ("Pet.") 21a. Following issuance of the Cashen Award, Brown was advised to return to work, and received a letter from the Employer confirming his reinstatement. In order to return to work, he quit his interim job, and proceeded to the Employer's facility, only to be told that he would not be reinstated. JA 55-56; JA 105-22.

The Employer then commenced an action in New York State Supreme Court, Suffolk County, to vacate the Cashen Award, claiming that the Arbitrator had engaged in misconduct. Local 282 filed a cross-petition to confirm. Initially, the Supreme Court confirmed the Award without a hearing, but the Appellate Division reversed and remanded for a hearing on the allegations of misconduct. *Glover Bottled Gas Corp.* v. *Local 282, I.B.T.*, 89 A.D.2d 1007, 454 N.Y.S.2d 447 (2d Dept. 1982). Following a hearing, at which the allegations of wrongdoing on the arbitrator's part were completely rejected, the Cashen Award was again

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[1] The signatories to the Agreement were Local 282 and Glover Bottled Gas Corporation ("Glover"). In February 1984, Glover changed its name to Synergy.

confirmed, and the Appellate Division affirmed. *Glover Bottled Gas Corp.* v. *Local 282, I.B.T.*, 119 A.D.2d 727, 501 N.Y.S.2d 394 (2d Dept. 1986).

Despite the confirmation of the Cashen Award, Synergy continued its refusal to reinstate Brown or to pay him any backpay. On July 12, 1985, Local 282 filed a new grievance with the American Arbitration Association ("AAA") seeking a remedy for Synergy's defiance of its contractual obligation to comply with an arbitrator's award. The issue to be arbitrated was:

> "How much money and what other relief are James Brown and Local 282 and affiliated funds entitled to receive pursuant to the arbitration award of James Cashen dated October 5, 1981."

JA 31.

Hearings were held on June 24, July 15, October 15 and November 26, 1986 before Arbitrator Jesse Simons, who had been designated by the AAA to hear and determine the July 12, 1985 grievance. While stipulating that the arbitral submission would be "What relief, if any, is James Brown entitled to pursuant to the Arbitration Award of James Cashen dated October 5, 1981," the parties agreed that the arbitrator had the authority under that submission to adjudicate on the merits the Union's claims for back pay, pension and medical benefits, attorneys' fees and union dues. Pet. 31a-32a; JA 362 n.*, 414 n.**.[2]

On June 15, 1987, Arbitrator Simons issued a 68 page Opinion with the following Award:

> I. The Employer, subject to III-A. herein, is directed to pay forthwith to James Brown:

---

[2] By the time the hearing convened, Brown was suffering from a brain tumor and was unable to work. JA 60-67. Consequently, Local 282's reinstatement demand became moot.

A. Back pay in the amount of $57,285 plus accrued interest from October 20, 1980 through March 31, 1987 in the amount of $32,255 for a total of $89,540;

B. Simple interest at 16% on the above back pay which totals $25.00 per day from April 1, 1987 until the date of payment;

C. $2,640 in lieu of profit sharing plan contributions, plus simple interest at 16% (totaling $1.16 per day) from April 1, 1987 until the date of payment.

II. The Employer is directed to pay forthwith to Local 282 Pension Trust Fund:

A. Contributions from October 24, 1980 through January 31, 1983 in the amount of $6,104 plus accrued interest from January 1, 1982 through March 31, 1987 in the amount of $5,127, for a total of $11,231;

B. Simple interest at 16% of $2.68 per day from April 1, 1987 until the date of payment.

III-A. The Employer is to deduct from the $57,285 to be paid to Grievant in I-A above, a sum equal to the dues specified in Article 13(a) and 13(b) of the Agreement, that would have been deducted from the wages of Grievant (after deducting for wages earned and unemployment benefits) that Grievant would have earned working for the Employer for the period October 9, 1980 to January 31, 1983 plus simple interest at 16% accruing beginning December 1, 1981 to the date of payment, and said sum is to be calculated on the basis of the Union's calculations as set forth in its Brief, and said sum is to be paid forthwith to Local 282, I.B.T., and in the event the Union concludes that the

> amount paid is incorrect it may, on prompt written notice to the Employer and the Undersigned, submit its dues claim at the hearing referred to below in III-B, and the Undersigned retains jurisdiction to determine said amount.
>
> III-B. The Employer is directed to pay to Local 282, I.B.T. a sum equal to the reasonable attorneys' fees incurred as a result of litigating the Employer's refusal to comply with Arbitrator Cashen's Award of October 5, 1981 in violation of Section 12(e) of the Glover-282 I.B.T. Collective Bargaining Agreement (Union Exhibit 2), and the Undersigned herewith retains jurisdiction to determine the amount of said fees, and hearings on same will be scheduled as promptly as possible, and jurisdiction is retained until such hearing and determination is made.

JA 427-28.

On July 9, 1987, the Union wrote Arbitrator Simons asking him to schedule a hearing to determine the amounts of union dues and attorneys' fees payable pursuant to Paragraphs III-A and III-B of his Award. Synergy responded by bringing an action to vacate the Simons Award in New York State Supreme Court, Nassau County, and obtaining an *ex parte* stay of further proceedings before Arbitrator Simons. Local 282 promptly removed the action to the United States District Court for the Eastern District of New York, counterclaimed to confirm the Award, and moved to consolidate this action with *Jaspan* v. *Synergy*, No. CV-87-0164 (E.D.N.Y. January 25, 1988) another case involving Synergy's defiance of an arbitrator's back pay award. Synergy moved to remand to New York State Supreme Court. By an oral decision dated September 19, 1987, Chief Judge Jack Weinstein denied the Union's motion to consolidate and the Employer's motion to remand. JA 523.

The parties then cross-moved for summary judgment, and by an oral decision dated January 25, 1988 (JA 620), and an Order dated February 4, 1988 (Pet. 17a-18a), Chief Judge Weinstein confirmed the Simons Award, vacated the State Supreme Court stay, and remanded to Arbitrator Simons for the calculation of attorneys' fees. Synergy appealed, and on July 26, 1988, the United States Court of Appeals for the Second Circuit unanimously affirmed Chief Judge Weinstein. Pet. 1a-16a. An application by Synergy to the Second Circuit for a stay was denied, and Synergy then filed the instant Petition for a Writ of Certiorari.

Summary of Argument

Synergy's Petition for a Writ of Certiorari satisfies none of this Court's discretionary considerations governing review on certiorari. Synergy concedes that the Second Circuit decision does not create a conflict among the Circuits. *See* Pet. 17. Neither can Synergy point to a conflict with any decisions of this Court or to any important question of federal law which has not been, but should be, settled by this Court.

Instead, this case involves a routine application of the principles enunciated in *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960) and *United Paperworkers International Union* v. *Misco, Inc.*, 108 S. Ct. 364 (1987). Synergy's efforts to give this case a larger significance misconstrues the record before the arbitrator and his well-reasoned Opinion and Award.

ARGUMENT

I.

Synergy Consented to an Adjudication on the Merits of the Union's Claims.

Synergy argued in the Second Circuit, and appears to be contending herein, that the submission to the arbitrator precluded the award of pension contributions, union dues and attorneys' fees. That is simply incorrect.

The Union's arbitration demand sought a determination of "How much money and what other relief are James Brown and Local 282 and affiliated funds entitled to receive pursuant to the arbitration award of James Cashen dated October 5, 1981." JA 31. Throughout the arbitration proceedings, the Union's claims for Pension Fund contributions. Union dues, medical reimbursement and attorneys' fees were repeatedly discussed. Pet. 23a-32a; JA 87-90, 177-84, 241-49. In determining the formal submission, the parties expressly agreed that Arbitrator Simons would have the authority to grant, "if it's justified," all of the Union's claims. Pet. 11a. The following colloquy from the transcript of the October 15, 1986 hearing, portions of which were excerpted by the Second Circuit in its decision (Pet. 11a), is dispositive of Synergy's contention:

> The Arbitrator: . . . Counselor, can you agree to a a (sic) stipulated issue to be arbitrated, which would consider the very simple language, what relief is James Brown entitled to pursuant to Arbitrator Cashen's award of October 5, 1981 with the clarification, which is now on the record perhaps three times, that I have made, namely, that you are free to advance all these other claims, and I will adjudi-

cate them, and he is free to advance arguments where you are not entitled to pension contributions, or payment of legal fees, or of payment medical fees, et cetera, et cetera?

I am saying all the claims you would advance under the heading of his rights as a reinstated employee pursuant to Cashen, I will entertain them. I will consider them, and I will decide them, and I will direct a payment with respect to that, if your argument is sustained. If it is not, there will be no direction of payment.

[Local 282's Attorney]: Based upon clarification and the understanding that you interpret this language to include—if it's justified—relief that might be actually paid to some other entity, I have no problem with that.

The Arbitrator: So when I said up for grabs, I mean up for grabs.

[Synergy's Attorney]: Yes.

The Arbitrator: All right.

[Synergy's Attorney]: Insert the words "If any," and—

The Arbitrator: So let us then rewrite what now appears as 6, and agree to it on the record.

[Synergy's Attorney]: Which we have been on?

The Arbitrator: Yes.

The Arbitrator: The parties are agreed, and have so stated, that the following issue is the issue to be arbitrated by me: "What relief, if any, is James Brown entitled to pursuant to the arbitration award of James Cashen, dated October 5, 1981."

Pet. 31a-32a.

In upholding arbitrator Simons' Award, the Second Circuit stated "that any doubt concerning the scope of the submission agreement is to be resolved in favor of coverage. . . ." Pet. 11a, *citing Federal Commerce & Navigation Co.* v. *Kanematsu-Gosho, Ltd.*, 457 F.2d 387, 390 (2d Cir. 1972); *accord Kurt Orban Co.* v. *Angeles Metal Systems*, 573 F.2d 739, 740-41 (2d Cir. 1978). At least three other Circuits agree that an arbitrator's interpretation of the scope of the submission is subject to great deference. *See Cement Divisions, National Gypsum Co.* v. *United Steelworkers of America*, 793 F.2d 759, 765 (6th Cir. 1986); *Mobil Oil Corp.* v. *Independent Oil Workers Union, OCAW*, 679 F.2d 299, 302 & n.1 (3d Cir. 1982); *IAM District 776* v. *Texas Steel Co.*, 639 F.2d 279, 283 (5th Cir. 1981); *cf. Enterprise Wheel & Car*, 363 U.S. at 598 ("It is not apparent that [the arbitrator] went beyond the submission"). Here, however, the degree of deference due an arbitrator's interpretation of the scope of the submission is not even properly before the Court. As Arbitrator Simons twice noted in his Opinion (JA 362 n.*, 414 n.**), Synergy expressly agreed that the arbitrator would have the authority to rule on the merits of all of the Union's claims. By doing so, the Employer waived any claim that the arbitrator exceeded the scope of the submission.

II.

The Arbitrator's Interpretation of the Agreement Did Not Exceed His Authority.

In its Petition, the Employer repeatedly conflates its objections to the Arbitrator's jurisdiction, which were waived, with its objections on the merits, which are insubstantial. In particular, Synergy disagrees with the arbitrator's finding that the Agreement authorized an award of attorneys' fees to Local 282.

Arbitrator Simons based his award of attorneys' fees on two independent and alternative grounds. The Arbitrator's first ground for the award of attorneys' fees was Synergy's violation of Section 12(e) of the Agreement, providing for compliance with an award within fifteen days after issuance. Simons found that Synergy violated the Agreement twice; first, by its discharge of Mr. Brown in 1980 without just cause in violation of Section 12(f) of the Agreement; second, by its refusal to comply with the Cashen award in 1981 in violation of Section 12(e). While reinstatement with backpay is the ordinary remedy for the first violation, the Arbitrator ruled that Section 12(e) creates an additional obligation on the Employer's part to make the Union whole for its expenses incurred as a consequence of the violation of that provision. JA 421-22. Arbitrator Simons interpreted that "make whole" remedy to include attorneys' fees.

Synergy contends that the Arbitrator misconstrued Section 12(e), and that the sole purpose of that Section was to authorize the Union to strike upon the Employer's failure to comply with an award. However, an arbitrator's purported error in construing a collective bargaining agreement does not warrant reversal of his award. *Misco,* 108 S. Ct. at 370-71; *Enterprise Wheel & Car,* 363 U.S. at 598-99. Under the decisions of this Court, it is the Arbitrator who is deemed to be familiar with the parties' bargaining history and industry practice; it is the judgment of the Arbitrator for which the parties bargained. *Id.* at 596-97; *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.,* 363 U.S. 574, 578-82 (1960).

As Arbitrator Simons noted, Section 12(e) is an "unusual" contract provision. JA 422. His construction of that unusual provision was reasonable, and is not subject to "plenary review by a Court of the merits." *Enterprise Wheel & Car,* 363 U.S. at 598-99; *see Misco,* 108 S. Ct. at 370-71.

The Arbitrator's second ground for the award of attorneys' fees was that Synergy's protracted defiance of the Cashen Award was frivolous and undertaken in bad faith. Synergy cannot credibly contend that the Arbitrator's factual findings in that respect were erroneous. For over eight years, Synergy has been avoiding its responsibility for its unlawful discharge of an older employee now suffering from a brain tumor. *See* JA 400-401. It made false accusations against Arbitrator Cashen, and frivolous arguments to Arbitrator Simons. Moreover, as Arbitrator Simons noted, Synergy has a history of willful defiance of its legal obligations.[3]

Arbitrator Simons had ample grounds for his finding that by engaging in "conscious, deliberate and egregious wrongdoing," (JA 423), Synergy had acted in bad faith within the meaning of *Alyeska Pipe Line Service Co.* v. *Wilderness Society*, 421 U.S. 240 (1975). He was fully justified in implying into the Agreement an obligation on Synergy's part to make the Union whole for the damages resulting

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[3] Local 282 represents only two small bargaining units of Synergy employees, yet the Employer has amassed a record of lawlessness unrivaled by malfeasant companies many times its size. *See, e.g., Glover Bottled Gas Corp.*, 255 NLRB 137 (1981), *enforced*, 112 LRRM (BNA) 2895 (2d Cir. 1982) (unlawful discharge of driver); *Glover Bottled Gas Corp.* v. *Local Union No. 282, I.B.T.*, 711 F.2d 478 (2d Cir. 1983) and *Glover Bottled Gas Corp.* v. *Local 282, I.B.T.*, 767 F.2d 907 (2d Cir. 1985) (unlawful discharge of shop steward and two other drivers); *Glover Bottled Gas Corp.*, 275 NLRB 658 (1985), *enforced*, 801 F.2d 391 (2d Cir. 1986), *cert. denied*, 107 S. Ct. 1288 (1987) (illegal discharge of four office employees); *Synergy Gas Corp., a/k/a Glover Bottled Gas Corp.*, 283 NLRB No. 100 (1987); *enforced*, 843 F.2d 1510 (2d Cir. March 30, 1988) (unlawful refusal to bargain); *Glover Bottled Gas Corp.*, Cases 29-CA-10641, 29-CA-10763-1, 29-CA-10763-2, 29-CA-10795-1, 29-CA-10795-2, 29-CA-11302, 29-CA-12653, Decision of ALJ Philip P. McLeod dated August 26, 1987 (JA 477) (numerous, violations including, *inter alia*, unlawful refusal to bargain, unlawful withholding of benefits, unlawful refusal to reinstate strikers and unlawful second discharge of shop steward).

from that bad faith.[4] His determinations concerning the nature of the Employer's conduct and the meaning of the Agreement were correct, and in any event are not subject to review on the merits. *See Misco*, 108 S. Ct. at 370-71.

An arbitrator's discretion is greatest *"when it comes to formulating remedies."* *Misco*, 108 S. Ct. at 372 (emphasis in original), *quoting Enterprise Wheel & Car*, 363 U.S. at 597. Arbitrator Simons reviewed the parties' arguments with care, and formulated an appropriate remedy based upon two alternative grounds.

An arbitrator's award will be sustained as long as he is "even arguably construing or applying the contract." *Misco*, 108 S. Ct. at 371. In order to warrant judicial relief, Synergy would have to demonstrate the invalidity of each of the grounds asserted by Arbitrator Simons as a basis for his Award. *Cf. Enterprise Wheel & Car*, 363 U.S. at 598 (where arbitrator's opinion is ambiguous as to whether he has exceeded his authority, award will nevertheless be confirmed). Here, both grounds asserted by the arbitrator are plausible, and there is no basis for second-guessing his "well reasoned sixty-eight page opinion." Pet. 16a.

Synergy correctly notes that arbitrators do not frequently award attorneys' fees.[5] Nothing in Arbitrator Simons'

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[4] Under New York law, a covenant of good faith and fair dealing has long been implied into every contract. *See, e.g., Kirke LaShelle Co.* v. *Paul Armstrong Co.*, 263 N.Y. 79 (1933). While New York law is not binding on the arbitrator, it can hardly be said that an arbitrator, construing a collective bargaining agreement executed in New York, is precluded from implying a similar covenant into the parties' Agreement.

[5] There are few reported decisions awarding such relief. *See, e.g., Fortex Mfg. Co.* v. *Local 1065, Amalgamated Clothing Workers of America*, 99 L.R.R.M. (BNA) 2303 (M.D. Ala. 1978); *Litton Unit Handling Systems* v. *Shopmen's Local Union No. 522*, 90

(footnote continued on following page)

Award or in the Second Circuit decision is likely to change that state of affairs. The arbitrator was confronted with an "unusual" contract clause and "egregious" employer behavior. The threat of a flood of arbitral attorneys' fee awards following in the wake of the Simons Award is pure mirage.

After eight years, it is time for this dispute to be put to rest. The Employer's Petition for a Writ of Certiorari does not raise any issue warranting review by this Court.

(footnote continued from preceding page)

L.R.R.M. (BNA) 3176 (S.D. Ohio 1975); *John Morrell & Co.*, 69 Lab. Arb. (BNA) 264, 282 (1977) (Conway, Arb.); *Sonic Knitting Industries, Inc.*, 65 Lab. Arb. (BNA) 453, 469 (1975) (Helfeld, Arb.); *Basic Vegetable Products, Inc.*, 64 Lab. Arb. (BNA) 620, 625 (1975) (Gould, Arb.); *Sunshine Convalescent Hospital*, 62 Lab. Arb. (BNA) 276, 279 (1974) (Lennard, Arb.); *see generally Leavenworth Times*, 71 Lab. Arb. (BNA) 396, 409 (1978) (Bothwell, Arb.).

Conclusion

For the foregoing reasons, Respondent respectfully submits that the Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit should be denied.

Date: New York, New York
November 22, 1988

Respectfully submitted,

FRIEDMAN, LEVY-WARREN & MOSS
Attorneys for Respondent
1500 Broadway, Suite 2303
New York, New York 10036
(212) 354-4500

By: .....
EUGENE S. FRIEDMAN
Attorney of Record

Of Counsel:

FRANKLIN K. MOSS
SUSAN L. ROSS